FOR ARGUMENT

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-421

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF LANDOWNER PETITIONERS

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I. NOTHING IN THE BRIEFS OF RESPONDENTS OR THE UNITED STATES JUSTIFIES DISREGARDING FIVE DECADES OF HISTORY.

As petitioners said in their opening brief, the heart of this case is not a series of legal arguments but the indisputable fact that fifty years ago Secretary Wilbur ruled that acreage limitation did not apply in Imperial Valley, and that since then two generations of people have planned their lives, expended their lives' labor and invested their savings on the basis of that longstanding contemporaneous interpretation of the Project Act. The relevant question now before the Court is whether anything in the briefs of

respondents, the United States, or the *amici curiae* requires the overturning of the status quo in Imperial Valley — a status quo defined in a contract with the government, approved in a special election, confirmed by an *in rem* judicial decree, and recognized in practice throughout the administrations of seven Secretaries of the Interior and five Presidents. Nothing in the opposing briefs could possibly justify such a result.[1]

A. Breaking Up Imperial Valley's Farms Today Would Serve No Relevant Purpose.

Respondents' principal argument is that acreage limitation should be applied in Imperial Valley, after 50 years, in order to fulfill the policies they assert underlie § 46 of the Omnibus Adjustment Act: the promotion of "family farms" as opposed to "large scale corporate absentee ownership," and the prevention of speculative gain resulting from federally-subsidized reclamation water. Respondents overlook that the only relevant congressional policy, that of the Congress that enacted the Project Act, mandates satisfaction of the present perfected rights of Imperial Valley farmers, not their destruction. But even if respondents were right as to the policies relevant here, it is plain that those policies would not be advanced by breaking up the settled economy of Imperial Valley.

1. Imperial Valley is Farmed by Families Today.

The record shows that petitioners, who were found by the district court to be representative of the class of excess landowners, maintain homes in the Valley with their families and farm the land they own. Landowner Pet. Br. 18-20. Understandably unhappy with what the record shows, respondents go outside it, and assert on the basis of inferences drawn from census figures that "large scale, absentee ownership has long characterized the Valley." Res. Br. 67. The simple census figures cited by

1. The United States has filed a brief herein, although the United States was not a party to the judgment of the Ninth Circuit in this case, and accordingly is not a party before this Court. The status of the United States before this Court is solely that of an *amicus*.

respondents are misleading, however, since they fail to distinguish between ownership by business corporations, and ownership by family corporations and family partnerships. The record, for example, shows that title to petitioner Brown's land is in a husband-wife corporation, 4 Tr. 339, that petitioner Nilson farms in partnership with his two brothers, 4 Tr. 380, and that petitioner Brockman farmed in partnership with his brother for 15 years. 4 Tr. 401. Such arrangements are common in the Valley.

Exact facts and figures on the extent of family ownership of Imperial Valley farms were assembled in 1977 for the use of the Senate Committee on Energy and Natural Resources. The figures show that 919 of the 973 farms in the Valley, or 94.5%, are operated by single family or multi-family enterprises. Only 15 of the farms are operated by business corporations or investor partnerships. If acreage is examined, family farm operations account for 93% of the cultivated irrigable land in the Valley.[2]

The farms in Imperial Valley are family enterprises, not absentee corporations. A policy to promote family farms is not served by driving families off the land they have farmed for decades.

2. There is No Speculative Gain To Be Prevented Today.

Breaking up the Valley's farms, fifty years after the Project Act, is equally pointless if the goal is to prevent speculation. Speculators on the Boulder Canyon Project,

2. *Acreage Limitations on Bureau of Reclamation Projects: Hearings on S. 242, S. 1812, S. 2310, S. 2606 and S. 2818,* Before the Subcom. on Public Lands and Resources, Sen. Comm. on Energy & Natural Resources, 95th Cong., 2d Sess. 440 (1978). *See also, Reclamation Reform Act of 1979: Hearings on S. 14, Etc.,* Before Subcom. on Energy & Research Development, Sen. Comm. on Energy & Natural Resources, 96th Cong., 1st Sess. 120, 247 (1979); 125 *Cong. Rec.* S. 12480 (daily ed., Sept. 13, 1979).

Nor, as respondents imply, is irrigated land in the Valley farmed predominantly by companies such as Inter Harvest, Inc., Holly Sugar Co., and the Irvine Company. Res. Br. 68. For the facts with respect to so-called "big corporate landowners" in Imperial Valley, see 125 *Cong. Rec.* S. 19264 (daily ed., Dec. 19, 1979).

if there were any,[3] are long gone; the present holders of Imperial Valley farms purchased their land at post-Hoover Dam market prices that reflected the value of any financial benefits offered by the Project Act.

For the same reason, respondents' talk of subsidies is beside the point. Simple economics teaches that the capitalized value of any subsidy will be included in the market price of any lands to be benefitted. Indeed, as the authorities cited by respondents explain, market value of land includes the value of the prospect of water. Res. Br. 17. The underlying theory of § 46 is that market prices for land will include "the capitalized value of the federal subsidy." Res. Br. 19. One who buys land at market value after water deliveries have begun receives no free subsidy; he pays a purchase price that includes the "capitalized value of the federal subsidy."

The record graphically shows the extent to which present owners have already paid for any benefits that accrued from the Project. Respondents and the United States both assert that the value of Imperial Valley farmland, apart from the benefits derived from the Boulder Canyon Project Act, would have been $25 to $50 an acre in 1971. Res. Br. 169; U.S. Br. 78. Yet petitioners' excess lands were all purchased after completion of the Project at prices many times greater than dry land prices, or in other words at market values that reflected any benefits from the Project, including any subsidy. Petitioner John Kubler and his wife, for example, farm 540 excess acres which they acquired in the 1960's at high market prices. In 1964, before the Barry Opinion, they paid $1,150 per acre for a 120 acre parcel.

3. It should be emphasized that there is no evidence of any speculation. To the contrary, land values in Imperial Valley were higher before completion of Hoover Dam and the All-American Canal than for many years after. Average values per acre for Imperial Valley farmland were $167.25 in 1920, $155.76 in 1930, $77.91 in 1940, $123.69 in 1945 and $241.00 in 1950. *1925 Census of Agriculture,* p. 456; *1935 Census of Agriculture,* Vol. I, p. 938; *1945 Census of Agriculture,* Vol. I, Part 33, p. 21; *1954 Census of Agriculture,* Vol. I, Part 33, p. 51.

4 Tr. 369. Petitioner Robert Brown and his wife farm 560 excess acres, which they acquired in 1961 and 1962 for an average price of $680 per acre. 4 Tr. 343-46.[4]

These figures do not simply demonstrate the absence of any subsidy to the present owners of Imperial Valley farmland. They also show the disastrously unfair consequences that will result to individual landowners if they are now forced to sell their land at a tiny fraction of what they paid for it. John Kubler and his wife mortgaged their farm for $345,000 in order to pay $391,000 for their "excess" acres. If forced to sell the "excess" portion of their farm at $25 per acre, they would lose $377,500 of their investment cost and be burdened with a $331,500 mortgage on their remaining 320 acres. 4 Tr. 366-71.

Nor would the losses simply be loss of land values. As the government's questioning of Mr. Kakoo D. Singh demonstrated, human values would be shattered:

"Q Do you think you are going to be harmed?

"A Oh, yes, if I lose the case.

"Q How?

"A I lose my ground. I spend my whole life fixing that ground, if I lose 400 acre maybe they going to sell at any price.

"Q Tell us everything that you think.

"MR. WORKS: About what?

4. Petitioner Stephen Elmore acquired his excess lands between 1951 and 1964, paying prices as high as $952 per acre in 1960. 4 Tr. 358-60. Charles Nilson acquired his excess lands during the period 1947-1961, paying prices as high as $825 per acre in 1958. 4 Tr. 381-87. Clara Gutierrez acquired her excess lands during the period 1948-1958, paying as much as $400 per acre in 1958. 4 Tr. 390-96. Harold Brockman acquired his excess lands during the 1940's and 1950's, paying as much as $344 per acre in 1957. 4 Tr. 400-02. Rose Singh acquired her excess lands during the period 1942-1958, paying as much as $500 per acre in 1958. LX-DK. John Bryant purchased his excess lands from 1945 to 1959, paying $400 per acre in 1959. 4 Tr. 415-21.

"BY MR. MOORMAN:

"Q That you think how you may be hurt. I just want to make sure that I get it all.

"A Well, I work for 50 years fixing this ground, I don't know this law going to be passed; if I know this law going to be passed I no have to buy, I no fix the ground. I just hear in 1965 that 160 acres, you know; before I never heard anything. I bought about $150,000 in machinery, you know. If they take my machinery it is no use for me, it is nothing but junk." LX-DK, p. 9.

Nothing in our history or traditions suggests that the 70th Congress, or indeed any Congress at any time, would knowingly have legislated results such as these.

B. A Reasonable Administrative Construction, Relied on for Decades, Must be Decisive as to the Proper Interpretation of the Project Act.

The United States implies that longstanding administrative practice is only one factor in determining Congress's intent under the Project Act — and not a very important factor. U.S. Br. 54-55. The doctrine of administrative interpretation, however, is not a mere canon of statutory construction. It is, as this Court has emphasized, a "venerable principle" of federal jurisprudence. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969). Where social and economic conditions have developed in reliance on a longstanding contemporaneous interpretation of an act of Congress, fairly susceptible to different constructions, it would be fundamentally unfair to disturb the administrative construction and upset the vast complex of private rights acquired in reliance thereon, simply to vindicate a supposedly more accurate, latter-day theory of what Congress originally intended. *See* Landowner Pet. Br. 24-27.

Accordingly, every reasonable doubt must be given to a contemporaneous interpretation of a statute made by those who were responsible for its enforcement and administration. This Court has held that a settled administrative construction "may add a gloss or qualification to what is on its face unqualified statutory language." *Saxbe v. Bustos,*

419 U.S. 65, 74 (1974). Such a construction is "decisive" of statutory meaning even "though inconsistent with the literalism of the act." *United States v. Alabama G.S. R. Co.,* 142 U.S. 615, 621 (1892). *See FHA v. Darlington, Inc.,* 358 U.S. 84, 90 (1958). To sustain that administrative construction, the Court "need not find that" it is the result the Court "would have reached had the question arisen in the first instance in judicial proceedings." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). All that need be shown is that the administrative construction "is at least an admissible one." *McLaren v. Fleischer,* 256 U.S. 477, 480-81 (1921); *Universal Battery Co. v. United States,* 281 U.S. 580, 583-84 (1930). Those who would turn back the pages of history and second-guess a contemporaneous construction of a statute carry an onerous burden of proof. It is not enough simply to show that the challenged construction "could with reason be said to have been wrong." *Hewitt v. Schultz,* 180 U.S. 139, 156-57 (1901). The administrative construction must be shown to have been "plainly" and "palpably wrong." *Id.* And this requires a showing that the statute is so "free from doubt" *(id.)*, and "so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933).

That is especially so where, as here, there is every reason to believe that the administrative construction represents as accurate an approximation of the intentions of the 70th Congress as anyone is ever likely to achieve. The Boulder Canyon Project, to put it mildly, was not a low-visibility matter in the 1920's and 1930's. It was the largest undertaking ever begun by the federal government, one which had been debated for years, passionately advocated and passionately denounced. It was the principal business, for years, of the Department of the Interior and of the Bureau of Reclamation. Commissioner Mead, Chief Counsel Dent, and Secretary Wilbur participated in hearing after hearing in Congress. They undoubtedly held scores of private conversations with interested Congressmen and Senators and were privy to votes and debates in executive session. Many things now forever lost to us were known first-hand to Wilbur, Dent and Mead. They were, quite simply, much more likely to have known the true

intention of the 70th Congress than is anyone today. *Cf. California v. United States,* 438 U.S. 645, 648 (1978). As Solicitor General Griswold noted, the view of Wilbur, Dent and Mead that the Act did not impose acreage limitation in Imperial Valley "did not cause a ripple at the time, and it was not seriously questioned in Congress or elsewhere. . . . It is hard . . . to think of officers who would have been better qualified to know what the resolution of this problem was."[5]

C. Respondents' Attacks on the Administrative Practice Are Without Substance.

Respondents and the United States attempt to minimize the importance of the nearly five decades of consistent administrative practice by characterizing the Wilbur ruling as a political maneuver, and by pointing to supposed "doubts" as to the correctness of the ruling and to the Barry Opinion, 31 years later, to show an "inconsistency" in the administrative view. Res. Br. 53-59; U.S. Br. 59-64. There is nothing to any of these points.[6]

The surest proof that the Wilbur ruling was not simply a political maneuver, as Solicitor General Griswold observed, is that

> "no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different." Appendix, p. A-5.

5. Memorandum by Solicitor General Griswold, Apr. 8, 1971, reprinted in 126 *Cong. Rec.* S. 1633 (daily ed., Feb. 20, 1980). This memorandum, published for the first time only last month, is included as an Appendix to this Reply Brief.

6. Respondents' innuendo that Secretary Wilbur's ruling was hastily contrived is contrary to historical fact. See Mr. Ely's recollections set out in *Reclamation Reform Act of 1979, Hearings on S. 14, Etc.,* Before Subcomm. on Energy Research & Development, Senate Comm. on Energy & Natural Resources, 96th Cong., 1st Sess. 439-40, 468-73 (1979).

Failure to raise doubts was not because of ignorance. Commissioner Mead remained in office till his death in 1936; he monitored the *Hewes* proceedings closely, and sought to give assistance to the District and its lawyers in their efforts to defeat Malan's contention that the contract was invalid because of its failure to include acreage limitation. LX-AQ. Malan's counsel wrote Secretary Ickes directly, calling attention to the reasons for Malan's claim that the contract was illegal, including its failure to provide for acreage limitation. LX-BK, p. 1, and attachment at pp. 18-19. When Secretary Ickes signed a contract with Coachella County Valley Water District on October 15, 1934, for repayment of its share of the cost of the All-American Canal, he followed the Wilbur ruling by omitting any provision for acreage limitation.[7] During the Ickes administration, Commissioner Page invoked the Wilbur ruling and the decision in *Hewes v. All Persons* in advising the Federal Land Bank that it was "the opinion of the Bureau of Reclamation that the [160-acre] limitation does not apply to . . . lands [in Imperial Valley]." LX-BR. Assistant Reclamation Commissioner Warne took the same position before Congress. *Hearings on H.R. 3961,* 78th Cong., 2d Sess., Part IV, pp. 599, 764-65 (1944). Secretary Ickes never expressed disapproval of the Wilbur ruling, nor did Commissioners Mead or Page.

No weight at all can be given to "doubts" that respondents say were prevalent in the Department of the Interior in the late 1940's. Former Solicitor Weinberg testified that those in the Department who then harbored doubts regarding the Wilbur ruling consciously decided *not* to raise the acreage limitation issue during the 1952 renegotiation of the All-American Canal Contract, because it would

7. The contract is printed in Wilbur & Ely, *The Hoover Dam Documents,* A633 *et seq.* (2d Ed. 1948). Acreage limitation was imposed in Coachella only 13 years later, when the District signed a new contract providing for the construction of a distribution system and the irrigation of 56,724 acres of *new* land. *See* Landowner Petitioners' Brief, p. 15n.14.

have been "counter productive" and because the District "would never have signed the contract." 3 Tr. 255. Moreover, isolated doubts periodically expressed by attorneys within the corridors of government are not a basis for denying the validity of a longstanding administrative construction. The reason for the doctrine of administrative construction is to protect rights and expectations acquired in legitimate reliance upon longstanding governmental practice. Citizens rely upon the *practice* of the government, and are not privy to expressions of doubt that might be expressed by lawyers within the government from time to time.

Solicitor Barry's purported reversal of the Wilbur ruling in 1964 likewise affords no basis for characterizing the administrative interpretation of the Boulder Canyon Project Act as "inconsistent" and therefore undeserving of recognition under the doctrine of administrative construction. This Court's decisions make clear that a latter-day attempt to change an administrative position does not defeat application of the doctrine of administrative construction. *California v. United States,* 438 U.S. at 675-76 & n.30; *United States v. Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956); *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 735-36 (1950); *FTC v. Bunte Bros., Inc.,* 312 U.S. 349, 351-52 (1941); *United States v. Chicago N.S. & M.R. Co.,* 288 U.S. 1, 13 (1933); *Luckenbach S.S. Co. v. United States,* 280 U.S. 173, 182 (1930); *United States v. Finnell,* 185 U.S. 236, 243-44 (1902).

II. CONGRESS'S INTENTION TO PRESERVE THE STATUS QUO IN IMPERIAL VALLEY WAS NOT A DEPARTURE FROM CONCEPTIONS OF NATIONAL POLICY THAT PREVAILED IN 1928.

Respondents argue that a congressional intention not to impose acreage limitation in Imperial Valley would have been a departure from prevailing views of national policy and an "exception to the then prevailing practice governing enforcement of acreage limitation where landowners receiving project water had preexisting 'vested rights.'" Res. Br. 86. This argument is wrong for three reasons: (1) Congress in the 1920's did not envision acreage limitation as a mechanism designed to break up successfully functioning and fully developed agricultural communities like Imperial Valley; (2) Congress in 1928 knew that the conditions in Imperial Valley were wholly unlike those which the acreage limitation laws addressed and did not view the All-American Canal as a reclamation project; and (3) administrative practice at the time provided for full recognition of vested water rights, and required acquisition or satisfaction of such water rights even when they were held by excess lands. As elaborated below, a water law expert of the 1920's would have been extremely surprised if Congress *had* imposed acreage limitation on Imperial Valley.

A. National Policy, As Articulated By Congress In The 1920's, Did Not Envision Application Of Acreage Limitation To Break Up A Successfully Functioning And Fully Developed Agricultural Community Like Imperial Valley.

Respondents suggest that by the mid-1920's there was a widespread practice of applying acreage limitation in a way that denied recognition of pre-project vested rights. That suggestion is contrary to the historical facts, as will be shown below. *See infra,* pp. 19-21. But irrespective of the validity of the assertion, what is significant is that respondents are unable to point to a single *congressional statement* in the 1920's expressing a *congressional perception* of national policy requiring imposition of acreage limitation in the unique type of situation that prevailed in Imperial Valley.

During the congressional proceedings which led to the enactment of § 46 of the 1926 Act, no congressman or administrative spokesman ever uttered a word suggesting that national policy required the use of § 46 to effect a wholesale breakup of farms and redistribution of land in stable, flourishing communities where full irrigation development, intensive cultivation and complete settlement had long since been attained. To the contrary, whenever acreage limitation

was discussed in Congress in the 1920's, its proponents always spoke of its application in the context of

— "unimproved desert land,"[8] or

— "sagebrush land,"[9]

— worth only "about $5 an acre,"[10]

— owned by "speculators,"[11]

— who do "not intend to cultivate it."[12]

The 1924 Fact Finders' Report, which recommended the § 46 divestiture mechanism to Congress, described the reclamation program in the following terms:

— "The reclamation act gave a unique opportunity for working out colonization plans which would provide for the fundamental needs of settlers." *Sen. Doc. No. 92*, 68th Cong., 1st Sess. 124 (1924).

— "Consideration must be given to . . . not merely reducing raw land to cultivation, providing buildings, implements, and stock, but in addition creating new social communities. Roads, telephones, schools, churches, often villages or towns — all the agencies necessary for modern life . . . [have] to be provided for at one time." *Id.* at 122.

— "Aside from the irrigation works and the unformed dirt roads, everything required to transform the desert into productive land [must] . . . be done. The land must be cleared. The farm unit must be fenced. A house for the family and a stable for the work animals have to be built, and provision has to be made for a water supply for household use." *Id.* at 128.

— "Much of the land under these irrigation systems . . . [is] of a rough, rolling character, which need[s] leveling and smoothing, really an engineering problem, before water . . . [can] be applied . . . successfully." *Id.* at 38.

8. *Hearings on H.R. 8836,* 68th Cong., 1st Sess. 348 (1924).
9. *Id.* at 38, 55.
10. *Id.* at 55, 348.
11. *Id.* at 38.
12. *Id.* at 56.

— "When development shifted from public to private land, no adequate measures were taken to curb the selfish inflation of prices, so that unwary and oversanguine settlers have paid as high as $200 an acre for *unimproved sagebrush land.*"[13] *Id.* at 124.

— "Large holdings of private land which [were] . . . *without water,* had very little value before the project was authorized. When the water became available their value immediately arose. . . . These private lands were often held at a very high figure, and the settler, full of hope, frequently agreed to pay a high price for the land. . . . Such private land, when held for speculative purposes, only added to the difficulty of the farmer who was engaged in winning a homestead from the desert." *Id.* at 114.

To be sure, the Fact Finders Report did refer to a few early reclamation projects where some privately owned lands had been irrigated prior to construction of project facilities.[14] *Id.* at 131. Those projects, however, involved situations radically different from the conditions prevailing in Imperial Valley, and Dr. Elwood Mead, who was one of the Fact Finders, was obviously aware of that difference when he told Congress in 1926 that acreage limitation would not be applicable in Imperial Valley. While the early projects mentioned by the Fact Finders did involve some prior irrigation, most of the project lands were still undeveloped sagebrush lands.[15] The lands did not have vested

13. Here, as elsewhere, emphasis is supplied unless otherwise noted.
14. The seven projects mentioned by the Fact Finders were Salt River, Uncompahgre, Yakima, Rio Grande, North Platte, Boise and Newlands.
15. On the Uncompahgre Project, 60 percent of the lands were unirrigated. Pl. Ex. 60, pp. 762-63. On the North Platte Project, most of the lands were unirrigated public lands (Pl. Ex. 70(d), p. 133), and the project ultimately brought water to "335,000 acres of sagebrush and range land." Pl. Ex. 60, p. 550. On the Boise Project, 59,460 of the project's 90,000 acres were unirrigated public lands. Pl. Ex. 70(d), p. 133. On the Newlands Project, the majority of the lands were unirrigated public lands. *Id.* at

rights to a full supply of water.[16] To the extent that small irrigation systems existed on these early projects, the government always purchased and rebuilt those systems. Thus, in addition to providing storage reservoirs, there was "a complete reconstruction of all existing works, which, after purchase by the Goverment, were enlarged and practically rebuilt." *Id.* at 131. Canal and lateral distribution systems were built for the districts involved.[17] And, most important for present purposes, if any previously irrigated lands on these projects had a full water right that was vested, the government avoided the cost of purchasing those rights *by agreeing that the water covered by the rights would be*

133. The Teiton Division of the Yakima Project covered 24,000 acres of unirrigated land, and excluded cultivated lands in an adjoining area which had prior water rights. Pl. Ex. 19, p. 999. The Sunnyside Division of the Yakima Project covered 40,000 acres of undeveloped lands. *Id.* at 1004.

16. On the Salt River project, the supply of water was "inadequate for the land in cultivation." Pl. Ex. 60, p. 664. On the Uncompahgre project, lands previously irrigated with an insufficient supply from the Uncompahgre River received an entirely new and different supply brought across the mountains via tunnel from the Gunnison River. *Id.* at 762. Lands on the Rio Grande Project did not have a vested right to a full water supply because the river always ran dry in the El Paso vicinity during the summer and longer periods. *Id.* at 632. On the North Platte, small irrigation systems had failed because the river was dry during growing seasons. *Id.* at 550.

17. On the Salt River Project, the government built 176 miles of canals and 1,132 miles of laterals. Pl. Ex. 665. The government constructed 783 miles of canals, laterals and drains to serve the Uncompahgre Project. *Id.* at 763. On the Rio Grande Project, 1,060 miles of canals, laterals and drains were built, on the North Platte 1,971 miles of such facilities were built, on the Boise 2,222 miles of distribution facilities were built, and on the Newlands Project, 939 miles of canals and laterals were built. Pl. Ex. 60, pp. 37, 536, 551 & 633.

transported through government canals to the excess lands which held the rights.[18] *See* pp. 19-21, *infra.*

This was the factual setting in which acreage limitation policy in the 1920's was formulated. The physical and economic conditions which were then associated with reclamation undertakings and acreage limitation were as different from the conditions prevailing in Imperial Valley as night is from day. The policies sought to be achieved on ordinary reclamation projects by application of § 46 were wholly inapposite to the circumstances existing in the Valley. And to suggest otherwise is to ignore historical fact.[19]

18. At page 32 of its brief, the government quotes a comment by the Ninth Circuit in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1112 (1976), to the effect that some early projects involved only construction of storage facilities to serve previously irrigated lands. The Ninth Circuit's observation is historically wrong. The Fact Finders' Report was the only authority cited by the *Tulare* court, and as shown above, the Fact Finders' Report actually contradicts the Ninth Circuit's observation. More importantly, the *Tulare* court was apparently unaware of the Reclamation Service's actual practice, in both the 1920's and earlier, of satisfying vested water rights held by excess lands *See* pp. 19-21, *infra;* 43 C.F.R. § 230.70.

19. Respondents' brief asserts that Projects since 1928 frequently have involved private lands having a history of pre-project irrigation. Res. Br. 50. Administrative practice as it evolved on other projects in the decades after 1928 is plainly irrelevant to the perceptions and intention of the Congress which enacted the Project Act. Moreover, the evidence upon which Respondents rely does not show a post-1928 practice of imposing acreage limitation to deny satisfaction of fully vested water rights. The evidence is Exhibit 17, a survey which was conducted by the government in 1968 to compile data on projects which included lands which were irrigated prior to construction of government facilities. Examination of Exhibit 17 reveals that on the 10 projects which were contracted for in the 1930's and 1940's, *sixty-nine percent of the lands* to be served were dry lands with no prior irrigation development. The Tucumcari Project contract, the only one in the survey dating to the 1930's, covered 45,000 acres, all of it previously unirrigated. Pl. Ex. 17. On those projects in the 1940's where there were some previously irrigated private lands, the evidence indicates that such lands did not have prior vested rights to the full supply that was to be developed for them by government facilities. *See e.g.*, Pl. Ex. 13, p. 3 (Coachella); Pl. Ex. 29 (Ivanhoe); Pl. Ex. 17 (W. C. Austin); Pl. Ex. 28 (Orange Cove).

B. Congress Did Not View The Boulder Canyon Project Act As a Reclamation Project Designed to Achieve the Sorts of Objectives That Were the Focus of the 1902 and 1926 Acts.

It is clear that Congress in 1928 believed that the Boulder Canyon Project Act was designed to achieve unique purposes quite unlike those which were the subject of the Fact Finders' 1924 recommendations and § 46 of the 1926 Act. In describing the many purposes of the project, the final House Report listed six: (1) flood control, (2) avoidance of water deliveries through Mexico, (3) supply of domestic water needs for coastal cites, (4) development of hydroelectric power, (5) improvement of navigation, and (6) solution of "international complications." *H. Rep. No. 918*, 70th Cong. 1st Sess. 6 (1928) (LX-DD(K)).

The House Report did not even mention reclamation except as a possibility reserved for the future: "The All-American canal will . . . make possible, at some future date, the irrigation of additonal land, mostly public, lying around the rim of the cultivated area." *Id.* Promotion of settlement — the overriding objective of the reclamation programs envisioned by the Fact Finders and authors of § 46 — was never conceived as a purpose of the Project Act.

Although § 14 incorporated reclamation law for limited purposes, it was clear to everyone in Congress that the Act was not a reclamation project in the ordinary sense of the term. As stated by Senator Pittman, when the Senate first debated the measure in 1927:

> "Mr..President, the Boulder Canyon Bill is not a reclamation bill and it is not a power bill. Its pendency is due solely and entirely to the necessity for flood control of the Colorado River." 68 *Cong. Rec.* 4406 (LX-DD(L)).

The proponents of the Act repeatedly emphasized that it was not intended to authorize reclamation of a single new acre. During the 1926 House Hearings, for example, Commissioner Mead testified:

> "Dr. MEAD: This bill does not go beyond the provisions for three things. One is the dam — the reservoir — and the second is the power plant, and the third is the all-American canal. That is all it deals with. It does not deal with irrigation of new lands at all." *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. 32 (1926) (LX-DD(D)).[20]

At the same hearings, Congressman Swing twice reiterated that the bill did not authorize a new reclamation project:

> "Mr. SWING: It does not bring under cultivation new land, but it does . . . make possible at a future date, when Congress is ready, additional reclamation." *Id.* at 105.
>
> • • •
>
> "Mr. SWING: . . . Under this bill the reclamation service does not contemplate making a new project and reclaiming land, and it would necessitate further legislation by Congress when it saw fit to authorize it." *Id.* at 134.

In the 1928 House hearings, Congressman Swing again testified that,

> "No provision is made in this bill for the reclamation of new lands at this time. The public lands are withdrawn from entry to prevent speculation, but it is left to a future date and for Congress to determine when it will authorize a new reclamation project and make appropriations for the distributing system. That matter is not included in this bill." *Hearings on H.R. 5773*, 70th Cong., 1st Sess. 13 (1928) (LX-DD(F)).

Finally, it was also emphasized during the floor debates that the Act did not provide for any new reclamation or authorize any new project:

> "Mr. SUMMERS: Is it not a fact that there would be no new land irrigated except in the Imperial Valley which is now irrigated except by an additional act of Congress?
>
> "Mr. SMITH: That is true." 69 *Cong. Rec.* 9493.
>
> • • •
>
> "Mr. SWING: The bill itself does not authorize a single dollar to reclaim any new land in the United States.

20. See also additional remarks of Commissioner Mead. *Id.* at 34-35.

Public land that might be reclaimed is withdrawn from entry to prevent speculation, but no new reclamation project is authorized in this bill. All that is postponed to some future date, when conditions justify it and Congress sees fit to authorize it." 69 *Cong. Rec.* 9644.

* * *

"Mr. SMITH: There is absolutely nothing in this bill providing for the irrigation of additional land. . . . The bill authorizes the construction of an All-American Canal to carry water to Imperial Valley lands already under cultivation . . . but it does not authorize any appropriations for putting water in new land." 69 *Cong. Rec.* 9784.

* * *

"Mr. SWING: . . . There will be no land reclaimed until Congress sees fit to authorize a reclamation project and authorizes appropriations for . . . distribution systems. . . ." 69 *Cong. Rec.* 9984.

* * *

"Mr. BURTNESS: . . . Can it safely be said . . . that so far as the actual putting of more agricultural land into use is concerned, there is no chance of that being done in less than 10 years and possibly not for 15 or 20 years?

"Mr. SWING: That is correct.

"Mr. SMITH: Even then the Congress would have to authorize the work.

"Mr. BURTNESS: That would be a reclamation project?

"Mr. SMITH: Yes." 69 *Cong. Rec.* 9985.

These statements clearly reflect the perspective and state of mind of the Congress which enacted the Project Act in 1928. Congress did not perceive that it was dealing with a matter of national reclamation policy. The problems it was addressing in the Project Act were not in the least comparable to the circumstances which were the focus of the Fact Finders' 1924 study of reclamation policy. Thus, the premise of respondents' argument that Congress should

not be presumed to have intended a departure from national reclamation policy is wholly without foundation in historical fact. Congress in 1928 did not believe it was engaged in a matter involving reclamation policy.

C. Pre-1928 Administrative Practice Provided for Satisfaction of Vested Rights.

As shown above, Congress's determination not to apply acreage limitation in Imperial Valley was not a departure from prior or contemporaneous perceptions of reclamation policy. The conditions associated with ordinary reclamation projects and the problems to which the 1926 Act was addressed simply did not exist in Imperial Valley. Hence it is not surprising that there was no vigorous debate when acreage limitation provisions for privately owned lands were excluded from the Act.

Furthermore, even had the All-American Canal been viewed as an ordinary reclamation project, Congress's decision to omit acreage limitation in the Valley would not have been viewed as a radical departure from reclamation policy. Indeed, nonapplication of acreage limitation in Imperial Valley was perfectly consistent with a then long-standing administrative practice providing for satisfaction of vested water rights held by excess lands. This practice had started in the very earliest days of the reclamation program, and formal opinions upholding the practice were rendered in 1905 by the Director of the Geological Survey, who then directed the Reclamation Service, and in 1906 by the Assistant Attorney General. 71 I.D. 520 (LX-U); 34 L.D. 351 (LX-V).

The 1905 and 1906 opinions concerned the Umatilla project — which was to irrigate about 20,000 acres, 9,000 of which were privately owned by the Maxwell Land Company. The company had a "partially completed . . . canal system" and had perfected a "vested right" to water for 300 of its acres. LX-U. The question at issue was whether the Reclamation Service could avoid the expense of purchasing the company's vested water right by agreeing to allow the water

covered by that right to be transported through the government-constructed canal to the 300 acres involved.

The Director of the Geological Survey concluded that the proposed delivery of water to satisfy the company's vested right would not be a violation of the 160-acre limitation law:

> ". . . [*I*]*t is the usual practice* in cases where an existing irrigation system is purchased for enlargement, to agree to furnish a water supply to the prior owners, frequently without even reserving the right to make a charge for maintenance. . . .
>
> ". . . [I]t has *heretofore been the policy* of the engineers of the Reclamation Service in negotiating contracts of this kind to provide for the recognition of such rights and the furnishing of the water whenever the plan would be cheaper than to pay for the water rights involved. It is believed that the prohibition of Section 5 of the Reclamation Act . . . does not apply to such cases as this, because the water right is not being sold, belonging as it does to the company, and such ownership being recognized by the contract." LX-U, pp. 4, 6.

The Assistant Attorney General agreed that the government's plan to satisfy the Maxwell Land Company's "vested right" did "not conflict with the provisions of paragraph 5 of the reclamation act." LX-V, p. 354.

In 1910, this administrative practice was explicitly made a regulation, and it has been in the Department's regulations ever since:

> "45. The provision of Section 5 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges." 38 L.D. 637 (1910) (LX-W); *see* 43 C.F.R. § 230.70.

The practice referred to in the 1910 regulation was consistently followed in the years prior to and contemporaneous with the passage of the Project Act. As Secretary

Wilbur noted, the administrative practice of permitting delivery of water through government facilities to satisfy pre-project vested rights of lands in excess of 160 acres was followed on "many projects," including the "Newlands Project, the North Platte Project . . . and others." LX-AO, p. 3. When excess lands were surveyed in 1937 by the Ickes administration, the Commissioner of Reclamation explicitly advised all Bureau personnel that the 160-acre limitation law "is not applicable in a case where a vested non-project water right for a larger area has been acquired and recognized." Bureau personnel were instructed that "irrigable areas covered by vested water rights should be excluded" from the survey of excess lands. LX-BN, pp. 1-2.

Respondents cite a Solicitor's Opinion in 1927 regarding the Minidoka Project, and contend that it reflects an administrative practice contrary to that discussed above. Pl. Ex. 14. In point of fact, however, the practice described in the 1927 opinion relates to an entirely different situation — privately owned lands having only a "*partial* water right," and in need of a "supplemental water right" to be secured from sources to be developed by government facilities. Pl. Ex. 14.[21] In no respect does the 1927 opinion purport to contradict the longstanding administrative practice per-

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21. None of the projects mentioned in the 1927 opinion involved lands having vested rights to a full water supply. For instance, the *Carlsbad Project* covered 25,000 acres, 15,000 of which had been previously irrigated by facilities owned by the Pecos Irrigation Company. A 1904 flood swept away the company's dam and destroyed all of its canals and laterals, and the company went bankrupt. The previously farmed lands were without any means of irrigation and were expected to "return to desert." Pl. Ex. 18, p. 223. The government purchased the company's assets, including its "claims to water," and rebuilt the entire system. Pl. Ex. 60, p. 82; Pl. Ex. 18, p. 225. On the *Owyhee Project*, which was authorized in 1927, there were 32,477 acres irrigated by pumping (Pl. Ex. 60, p. 580) and 73,000 acres "in a natural state covered with black sage." *1928 Report of Bureau of Reclamation*, p. 158. "Much of the land" was reported as "privately owned by people who have neither capital nor intention of becoming irrigators when water is available." *1927 Report of Bureau of Reclamation*, p. 25. The government developed the project by building a dam, 107 miles of canals, 443 miles of laterals and 155 miles of drains to serve 105,016 acres of land with a full irrigation supply. Pl. Ex. 60, p. 580.

mitting the delivery to excess lands of water satisfying pre-project vested rights to a full supply.

In sum, there was nothing about administrative practice prior to and contemporaneous with the Project Act that would have impelled anyone in Congress to engage in vigorous protest at the thought of not applying acreage limitation in Imperial Valley. Nonapplication of acreage limitation in the Valley was entirely consistent with then prevailing reclamation practice.

III. RESPONDENTS FAIL TO SHOW THAT THE LANGUAGE OF THE PROJECT ACT INCORPORATES ACREAGE LIMITATION.

A. Present Perfected Rights Are Not Rights Limited By A Condition Of "Antecedent Eligibility" Under Federal Law.

The principal impediment to applying acreage limitation to the Imperial Valley is § 6, which mandates that petitioners' present perfected rights *"shall* be satisfied." In an attempt to escape the force of this provision, the government would rewrite § 6 to provide that present perfected rights "shall be satisfied *except as otherwise inconsistent with federal reclamation law.*" According to the government, even if a water right was acquired and perfected under state law, the Secretary need satisfy it only if the holder and user of that right has established an "antecedent eligibility" making him "otherwise entitled" under federal law "to receive a designated quantity of federal water." U.S. Br. 36-37. This hypothesis is not only directly contrary to the statutory language, but at odds with the legislative history and plainly inconsistent with this Court's decision in *Arizona v. California.*

When Congress spoke of the water rights of Imperial Valley farmers, it referred to all "the lands in the Imperial Valley which have been irrigated." 70 *Cong. Rec.* 528. As Congress noted, "these lands already have a water right." *S. Rep. No. 592,* 70th Cong., 1st Sess. 4 (1928). There is not one iota of evidence in the legislative history of the Project Act suggesting that Congress intended to guarantee

satisfaction of the water rights of only some of the farms in Imperial Valley, while permitting denial of the vested rights of other farms on some theory of "antecedent eligibility."

The government's theory is also patently contrary to the definition of present perfected rights explicated by this Court in *Arizona v. California.* Present perfected rights were not defined by this Court as entitlements conditioned upon some form of "antecedent eligibility" under federal law. A "present perfected right" is a "water right acquired in accordance with *state law,* . . . existing as of June 25, 1929." 376 U.S. at 341. State law is the measure of present perfected rights, and the only "antecedent" requirement is that the rights have "been exercised by the actual diversion of a specific quantity of water to a defined area of land." *Id.*

B. The Government's Explanation of § 1 Confirms The Improbability of Any Congressional Intention to Impose Acreage Limitation.

The government acknowledges that Congress enacted the § 1 proviso prohibiting water charges in order to avoid the "unfairness of imposing a charge for water upon *landowners* who had a pre-existing right of use."[22] U.S. Br. 41. That is precisely true and it underscores § 1's relevance as an aid to discerning Congress's intent about acreage limitation. Since Congress thought it unfair to charge landowners for deliveries of water to which they had a pre-existing right of use, it is inconceivable that Congress could have intended the far more drastic impairment of these rights that would result from acreage limitation.

C. Section 14 Does Not Incorporate Acreage Limitation.

In an attempt to avoid the undisputed fact that the Project Act does not on its face incorporate the acreage limitation provisions of § 46, the United States argues that all of the reclamation law, including § 46, would apply to the

22. The government thus recognizes that Congress was concerned with respecting pre-existing rights of *landowners,* not simply the pre-existing legal title to such rights held by the District as trustee for the landowners.

Boulder Canyon Project "even in the absence of . . . Section 14." U.S. Br. 29. That notion makes no sense at all. Congress authorizes all kinds of projects dealing with water, but not all water projects are governed by reclamation law. Moreover, as described above, Congress did not view the All-American Canal as a reclamation project. *See* pp. 16-18, *supra.*

Section 14 incorporates reclamation law only as to the "construction, operation and management" of project works. Petitioners' opening brief points out that under the vocabulary of the Act these words have a very limited meaning that does not include matters governing water delivery. Section 10 authorizes contracts for "operation and maintenance," while § 5 separately authorizes contracts for the "delivery" of water for "irrigation." Section 1 proscribes any charge for the "delivery of water," while Section 4(b) requires reimbursement for construction, operation and maintenance. And § 8(a) distinguishes between "construction, management and operation" of the works, on the one hand, and "storage, diversion, delivery, and use of water" on the other hand. The United States's only reply to this textual analysis is that § 8(b) speaks of "constructing, managing, and operating the . . . works herein authorized, *including* the appropriation, delivery and use of water." U.S. Br. 49. This observation about § 8(b) simply proves petitioners' point. When Congress intended the words "constructing, managing and operating" to include reference to appropriation, delivery and use of water, it said so by expressly using the words "appropriation, delivery, and use of water."

Notwithstanding the limited meaning of the words "construction, management, and operation" in the language of the Project Act, respondents assert that the Court in *Ivanhoe* found similar language in § 2 of the 1937 Rivers and Harbors Act "sufficient . . . to represent a Congressional mandate requiring compliance with the acreage limitation." Res. Br. 102. That is not true. In deciding the applicability of the 160-acre limitation law in *Ivanhoe,* this Court did not even cite § 2 of the 1937 Rivers and Harbors Act, much less interpret any of its language. Instead, the Court focused on

legislative debates in the 1940's and on the administrative practice of incorporating 160-acre limitation provisions in the Central Valley Project contracts. The Court reasoned that Congress knew of these contracts when it made continuing appropriations for the project and that this constituted "ratification of administrative construction, and confirmation and approval of the contracts." *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U.S. 275, 293 (1958). Obviously, if the same type of analysis is applied in this case, where Congress made continuing appropriations for the All-American Canal when advised of the Imperial Irrigation District contract and the Wilbur ruling, the conclusion must follow, as it did in *Ivanhoe,* that there has been congressional ratification of the longstanding administrative practice regarding the inapplicability of acreage limitations to the Imperial Valley.

Respondents also observe that "§ 9 requires the opening of public lands for entry 'in accordance with the provisions of the reclamation law' — *a general reference to the reclamation law similar to the general reference in § 14.*" Res. Br. 99. This observation simply proves petitioners' argument about the limited scope of § 14. In two separate places § 9 specifies that something must be done "in accordance with the provisions of the reclamation law." In a third place it specifies that entries shall not "exceed one hundred and sixty acres," the same as the limitation contained in reclamation law. And in a fourth place § 9 specifies that exclusive preferences are to be "subject . . . to the provisions of subsection (c) of section 4 of the Act of December 5, 1924," part of the reclamation law. None of these repeated references in § 9 to reclamation law would have been necessary if Congress had understood § 14 as effecting a wholesale incorporation of reclamation law into the Project Act.

As noted in petitioners' opening brief, § 9's specific incorporation of acreage limitation as to *public* lands demonstrates that Congress would have included a parallel provision for private lands if it had intended acreage limitation to apply to Imperial Valley. Respondents and the government argue that § 9 is not apposite to the subject of

acreage limitation because "it says nothing about water delivery" (Res. Br. 98) and does not deal "with acreage limitation at all." U.S. Br. 42. The first observation is irrelevant and the second is not true. Reclamation law provides for two parallel, but independent, mechanisms of acreage limitation: in the case of public land, acreage limitation is achieved by restricting the size of entries, and in the case of private land, acreage limitation is achieved by restricting water deliveries. Section 9 obviously says nothing about water delivery because it deals only with public lands. What is significant is not § 9's omission of reference to restrictions on water delivery, but the Project Act's omission of any parallel provision imposing restriction on delivery of water to private lands.

IV. RESPONDENTS' ARGUMENTS DEMONSTRATE THAT THE LEGISLATIVE HISTORY OF THE PROJECT ACT IS REASONABLY SUPPORTIVE OF THE CONTEMPORANEOUS ADMINISTRATIVE INTERPRETATION OF THE ACT.

Respondents assert that consideration of legislative history is "unnecessary" and "of academic interest only." Res. Br. 117. Implicitly, this argument acknowledges a fact that is beyond dispute — the overwhelming weight of the evidence in the legislative record indicates a congressional intention not to apply acreage limitation in Imperial Valley.

A. Respondents Have Not, And Cannot, Point To A Single Sentence In The Legislative Record Stating That Acreage Limitation Would Be Made Applicable To Privately Owned Lands in Imperial Valley.

As detailed in petitioners' opening brief, proponents and opponents of the Act, including the Commissioner of Reclamation, stated explicitly and unambiguously that the Act would not impose acreage limitation on privately owned lands in Imperial Valley.

1. During the 1924 House hearings, Arthur P. Davis, co-author of the Fall-Davis Report, testified that the bill would not apply acreage limitations to lands already

under irrigation in Imperial Valley. *Hearings on H.R. 2903,* 68th Cong., 1st Sess. 1448 (1924); LX-DD(B).

2. In the 1926 House hearings, Dr. Elwood Mead stated that nothing in the Act would apply acreage limitation to the farms then irrigated in the Valley. *Hearings on H.R. 6251 and H.R. 9826,* 69th Cong., 1st Sess. 32-33 (1926); LX-DD(D).

3. At the same hearings in 1926, Congressman Swing, co-author of the Act, also testified unequivocally that the 160-acre limitation laws would not be made applicable to the farms then being irrigated in the Valley. *Id.* at 33.

4. On April 9, 1928, Senator Ashurst issued a Minority Report on S. 728, stating that the bill would not impose acreage limitation on privately owned lands in the Valley. *S. Rep. No. 592,* 70th Cong., 1st Sess., Part II, pp. 3, 5, 26 (1928); LX-DD(J).

5. On May 2, 1928, Senator Hayden introduced an amendment to include an acreage limitation provision in the Act, and spoke at length on the floor of the Senate, vehemently protesting that absent his amendment the Act would not subject privately owned lands in the Valley to acreage limitation. 69 *Cong. Rec.* 7634-35; LX-DD(M).

6. On May 22, 1928, Senator Hayden spoke on the floor of the Senate and again commented on the need for his amendment providing for acreage limitation. 69 *Cong. Rec.* 9451; LX-DD(N).

7. On May 29, 1928, Senator Ashurst spoke on the floor of the Senate and objected that the Act would permit irrigation of "lands owned . . . in excess of 160 acres." 69 *Cong. Rec.* 10471, 10495 (1928); LX-DD(P), (Q).

8. On December 8, 1928, Senator Ashurst again spoke on the floor of the Senate and again objected that the Act would permit delivery of irrigation water to privately owned lands in excess of 160-acres. 70 *Cong. Rec.* 289; LX-DD(S).

Respondents by contrast cannot point to a single sentence in the six year legislative record stating that the Act would make the 160-acre limitation laws applicable to privately owned lands in Imperial Valley. All that respondents can do is cite generalized statements, *never uttered in the context of discussion of acreage limitation,* to the effect that the Project Act would be "a part of the reclamation law." *E.g.,* Res. Br. 130.

Respondents assert that the statements by Senators Ashurst and Hayden "were apparently not taken seriously by anyone." Res. Br. 132. There is nothing in the record to support such conjecture, and the fact that Hayden and Ashurst were opponents to the Act does not detract from the probative value of their statements, *"especially where, as here, proponents of the bill make no response to the opponents' criticism."* *Arizona v. California,* 373 U.S. 546, 583 n. 85 (1963).

Here, the proponents had ample opportunity to respond to Ashurst and Hayden, but did not. The Majority Report on S. 728 did not respond to Senator Ashurst's Minority Report. On the floor of the Senate, Senators frequently interrupted Senator Ashurst to respond to those criticisms which they believed were premised on a misreading of the bill's provisions. *E.g.,* 70 *Cong. Rec.* 287-89. They did not, however, take issue with his assertion that the Act would not impose acreage limitations. That had been the clear understanding expressed on every occasion when the subject of acreage limitation was discussed.

B. The Substitution of S. 728, Which Omitted An Express Acreage Limitation Provision, for H.R. 5773, Which Contained An Acreage Limitation Provision, Evidences An Intention Not To Apply Acreage Limitation.

As discussed in petitioners' opening brief, Congress's intent not to apply acreage limitation to Imperial Valley is also evidenced by the Senate's action in substituting S. 728, which did not contain an acreage limitation provision, for H.R. 5773, which contained an express provision. Respondents and the United States attempt to evade the differences in the two bills by misreading Senator Johnson's comment that the two bills had "like purposes . . . and like designs." 70 *Cong. Rec.* 67.

Senator Johnson did not claim that the two bills were identical — only that the broad "purposes" and "designs" were the same. Indeed, there were 36 differences between the terms of S. 728 and the provisions of H.R. 5773, twenty of which were significant, substantive differences.[23] Congress was aware of those differences and, where it believed that a provision of H.R. 5773 should be included in the final Act, the provision was reinserted in S. 728.[24] But Congress did not reinsert the deleted acreage limitation provision. And it did not do so, even though the absence of an acreage limitation provision in S. 728 was expressly brought to the Senate's attention after the substitution was made. *See* 70 *Cong. Rec.* 289.

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23. For instance, § 1 of S. 728 contained two provisions not in H.R. 5773, one requiring reimbursement of expenditures for the canal (LX-Q, p. 2, lines 11-13) and one providing that no charge was to be made for water for irrigation or potable uses (LX-Q, p. 2, lines 13-15). Conversely, § 1 of H.R. 5773 contained five provisions not in S. 728: a provision requiring application of state and municipal labor laws (LX-P, p. 2, lines 11-16), an elaborate acreage limitation provision (LX-P, p. 2, line 16 to p. 3, line 5), a provision requiring that plants be constructed only in states which had approved the Compact (LX-P, p. 3, lines 6-8), a provision requiring appointment of a Board of Engineers and Geologists (LX-P, p. 3, line 12 to p. 4, line 2), and a provision prohibiting any construction prior to approval of plans by such Board of Engineers (LX-P, p. 4, lines 2-7). The other sections of S. 728 and H.R. 5773 also had significant differences. *See* LX-P, p. 7, lines 15-17; LX-P, p. 8, lines 8-9; LX-Q, p. 6, line 25 to p. 7, line 8; LX-Q, p. 8, lines 1-12; LX-Q, p. 10, lines 15-17; LX-P, p. 11, lines 5-9; LX-P, p. 12, lines 8-13; LX-P, p. 12, line 14 to p. 13, line 2; LX-P, p. 13, lines 3-13; LX-P, p. 13, lines 15-18; LX-P, p. 15, lines 5-10; LX-P, p. 22, lines 8-10; LX-P, p. 22, lines 11-13.

24. For example, the House version of H.R. 5773 contained a provision requiring all § 5 contracts to conform to § 4(a) of the Act. LX-P, p. 8, line 9. This provision was not in the Senate bill that was substituted for H.R. 5773, but was put back into § 5 of the Act as passed. Similarly, the House version of H.R. 5773 contained a § 16 disclaiming denial of Mexican water rights. LX-P, p. 22, lines 11-13. This provision was deleted by the substitution of S. 728 but was put back as § 20 of the final Act.

C. Sparsity Of Comment About Acreage Limitation In The Legislative History Does Not Suggest A Congressional Intention To Apply Acreage Limitation.

The United States argues that it is reasonable to assume that "vigorous debate" would have attended the passage of any measure excluding Imperial Valley from application of acreage limitations, and that the absence of "vigorous debate" makes "it highly improbable that Congress intended the excess acreage limitation not to apply to Imperial Valley." U.S. Br. 47-48. The government's speculation proceeds from a hypothesis that is entirely at odds with the historical record of the state of mind of Congress in the 1920's. In point of fact, when Commissioner Mead, Congressman Swing and Senators Hayden and Ashurst observed that the Act would not impose acreage limitation, those statements evoked *no* debate, vigorous or otherwise. What *would* have evoked debate would have been any effort to break up Imperial Valley.

V. DENIAL OF FULL FAITH AND CREDIT TO THE *HEWES* JUDGMENT WOULD IMPOSE OBLIGATIONS UPON THE DISTRICT AND ITS LANDOWNERS WITHOUT THEIR CONTRACTUAL AND ELECTORAL CONSENT, CONTRARY TO FEDERAL AND STATE POLICIES REQUIRING SUCH CONSENT.

Federal law has always assumed that reclamation projects are consensual undertakings, and thus obligations imposed upon districts must be agreed to by contract. California law mandates even more stringent requirements of consent. In addition to requiring that contracts be approved by the district's directors, California law requires that contracts be approved by electoral vote. 1917 Cal. Stat. 245.

The obligations to which the District and its electors consented in 1932 were judicially confirmed in *Hewes v. All Persons*. Refusal to accord *res judicata* effect to the *Hewes* judgment would not only frustrate the public interest in maintaining the stability of *in rem* judgments, but would also make a travesty of the requirements of consent that

are contemplated by state and federal law. The Imperial Irrigation District would be forced at this late date to assume acreage limitation obligations to which it does not now consent, and to which it did not and would not have consented in 1932. Moreover, this would occur at a time when the opportunity of an alternative choice — use of the Alamo Canal — has been irretrievably lost. As for the landowners in the Valley, their rights to water and their rights and obligations *vis à vis* the District were supposed to be permanently fixed by the judgment in *Hewes*. Disregard of that judgment not only would deprive them of rights secured by judicial decree, but would do so without their electoral consent, in flagrant violation of California law.

Respondents do not deny, and cannot deny, that the foregoing consequences would flow from a denial of full faith and credit to the *Hewes* judgment. They ignore such consequences and make no argument purporting to justify disregard of the federal and state requirements of contractual and electoral consent. Instead, they assume, but do not show, that it would be "unjust" to abide by the 1933 state court judgment, and invoke various technical grounds which supposedly would permit circumvention of the *Hewes* judgment. None of these arguments has merit, but even if there were a technical ground which might provide an arguable basis for ignoring *Hewes*, invoking such technicalities could hardly be justified in view of the destruction of state and federal policies of contractual and electoral consent that would result.

A. The *Hewes* Case Was An Adversary Proceeding Entitled to Full Recognition.

On the basis of pure speculation, respondents suggest that *Hewes* was a "collusive" proceeding in which Malan and the District were not genuine adversaries. Res. Br. 148. The record provides no basis for such speculation and, to the contrary, establishes that Malan was a persistent adversary whose attacks on the contract were seriously intended and taken seriously by both the District and the Department of the Interior.

Even before the confirmation proceeding in *Hewes* was initiated, Charles Malan had been on the District's back, seeking to stop the contract. Malan initiated his own preemptive strike by filing a suit against the District, *Malan v. Imperial Irrigation District,* seeking to enjoin the directors of the District from taking any steps to carry out the contract. LX-AG; LX-AI. In that action, as he later did in *Hewes,* Malan attacked the contract in "a number of ways as being in conflict with the Reclamation Law," including its alleged violation of the 160-acre limitation laws. LX-AQ. Because of the federal issues raised, the District's counsel sought the aid of government counsel in defending the case. LX-AQ. After commencement of the *Hewes* case, there was so much concern about Malan's attack that two of the District's directors asked Commissioner Mead to dispatch Chief Counsel Dent to El Centro to assist in defense of the case. LX-AP. Of all the issues raised by Malan, the 160-acre limitation issue was the one on which the government's involvement and cooperation was the most direct, for the assistance of government counsel was sought "particularly in connection with the 160-acre limitation" question. LX-AQ.

During the trial, Malan and other objectors attacked "the contract from every conceivable angle," including the "160-acre limitation." LX-AL. After the taking of evidence, three full days of oral argument were presented before Judge Wilson in Los Angeles, followed by the filing of post-trial briefs. The Bureau's District Counsel advised Commissioner Mead that the attorneys for Malan and the other objectors continued to argue "every conceivable point in their attempts to have the contract declared invalid." LX-AX. "About the only features of the contract not attacked were the article numbers . . . ." *Id.*

Following the issuance of Judge Wilson's opinion on May 24, 1933, and the issuance on July 1, after hearing, of findings of fact and conclusions of law, Malan moved for a new trial, and his motion was denied on July 28. LX-BF. Malan appealed the *Hewes* judgment, and Malan's attorney even went so far as to send a copy of his brief to Secretary Ickes, pointing out the reasons for his belief that the "contract is illegal," including the acreage limitation question.

Even though the pendency of the appeal blocked any federal appropriations for construction of the canal (LX-BH), Malan refused to dismiss his appeal until late February 1934. LX-BM.

As made amply clear by the foregoing evidence in the record, *Hewes* was not a friendly test-suit proceeding in any sense. Respondents nonetheless assert that "it takes little imagination" to perceive that the proceedings were non-adversary. Res. Br. 148-49. That is true: one must ignore the record and rely upon *imagination* to conjure up such a theory.

B. The *Hewes* Court Properly Considered the Federal Statutes Affecting the Validity of the Contract.

While conceding that the *Hewes* court properly concluded that the All-American Canal Contract did not require acreage limitation, the government argues that the state court somehow exceeded its jurisdiction when it went on to consider whether this omission was proper under the applicable federal law. U.S. Br. 71. Such a restrictive notion of contract validation makes no sense. Clearly, if acreage limitations applied to Imperial Valley as the government now contends, federal law — § 46 — required that the *contract* provide for appraisal and disposition of excess lands. 43 U.S.C. § 423(e). Since the All-American Canal Contract contained no such provision, the *Hewes* court could validate the contract *only* by finding that acreage limitation did not apply. If it found that acreage limitation did apply, the *Hewes* court would have been required to invalidate the contract. Under California law, it could not imply into the contract conditions to which the parties had not agreed and which had not received electoral approval. Under either scenario, an interpretation of federal law was essential to a determination of validity.

The California Supreme Court's decision in *Metropolitan Water Dist. v. Marquardt,* 59 Cal. 2d 159, 379 P.2d 28, 28 Cal. Rptr. 724 (1963), makes amply clear that where a contract is challenged because it does not provide for federal acreage limitation, that federal question must be adjudicated in order to determine the contract's validity. *Mar-*

quardt was a mandamus action brought under state law for the purpose of obtaining a judicial decree validating a contract between a state water agency and the Metropolitan Water District. The contract did not provide for acreage limitation, and one of the principal objections was that the contract had failed to include federally required acreage limitation, and was thus invalid. The California Supreme Court examined federal law in depth — like the *Hewes* court — and upheld the validity of the contract, holding that federal law did not require inclusion of an acreage limitation provision. *Id.* at 188-192.

In sum, there is no California or federal case holding that it is improper for a court to adjudicate acreage limitation questions or any other relevant federal issues in a confirmation proceeding brought under California's statutory scheme. All of the cases which have involved acreage limitation issues squarely contradict respondents' theory of California jurisdictional law.

C. Congress Has Not Reserved to Federal Courts Exclusive Jurisdiction to Decide Reclamation Law Questions.

Respondents argue that when Congress enacted a requirement in 1922 that reclamation contracts be confirmed in a "court of competent jurisdiction," Congress did not intend that state courts would adjudicate reclamation law questions. This argument mistakenly assumes that the Act of May 15, 1922 was a congressional grant of limited jurisdiction to state courts. In point of fact, the Act of May 15, 1922 is not a grant or limitation of jurisdiction at all, but merely a requirement for judicial confirmation before a "contract with an irrigation district . . . shall be binding on the United States." Whether a state tribunal, such as the *Hewes* court, "has competency to render a judgment in an action is a question of local law of the State in which the judgment is rendered." *Restatement, Judgments,* § 7 Comment a. The *Hewes* court plainly had such jurisdiction under the applicable California statutory law providing for confirmation proceedings. 1917 Cal. Stat. 245, § 3; 1897 Cal. Stat. 276, § 68; Cal. Water Code §§ 23225, 22670.

Moreover, except in instances where Congress has expressly restricted jurisdiction to federal courts, state courts have concurrent jurisdiction with federal courts to determine issues arising under federal statutes. *Grubb v. Public Utilities Comm'n,* 281 U.S. 470, 476 (1930).

When Congress provided in the Act of May 15, 1922 that irrigation district contracts be "confirmed by decree of a court of competent jurisdiction," there would have been no doubt that federal questions arising under the reclamation laws could be adjudicated in the required confirmation actions. State-court confirmation proceedings to validate contracts entered into by the Secretary of the Interior and irrigation districts had been the accepted practice for more than a decade when Congress passed the Act of May 15, 1922. These state court confirmation proceedings involved adjudications of issues of federal law, such as the Secretary's authority under the Act of 1902. *See McLean v. Truckee-Carson Irr. Dist.*, 49 Nev. 278, 245 Pac. 285, 288-289 (1926); *Nampa & Meridian Irr. Dist. v. Petrie,* 28 Idaho 227, 153 Pac. 425, 429-30 (1915); *Hillcrest Irr. Dist. v. Brose,* 24 Idaho 376, 133 Pac. 663 (1913); *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 Pac. 382, 383 (1913). The congressional debates and reports which accompanied the 1922 Act made clear that Congress contemplated that state courts would perform the validation function just as they had been doing in the past. 62 *Cong. Rec.* 3574; *H. Rep. No. 622,* 67th Cong. 2d Sess. 5, 7.

D. "Intervening Events" Provide No Justification For Denying the *Hewes* Judgment Its Proper *Res Judicata* Effect.

The United States argues that since 1933 there have been "several legal developments" which create an altered situation warranting denial of any *res judicata* effect to the *Hewes* judgment. U.S. Br. 73; *see also* Res. Br. 159-62. The "intervening" developments cited by the United States are this Court's decisions in *Ivanhoe, Arizona v. California* and *California v. United States.* None of these decisions announced "a change in the law" as applicable to the Boulder Canyon Project Act or the Imperial Irrigation District Contract. As previously shown, the principles explicated in

Ivanhoe are not contrary to the judgment in *Hewes*. Nor is there any inconsistency between *Hewes* and the principles articulated by this Court's decisions in *Arizona v. California* and *California v. United States*.

The "intervening change of law" theory upon which the United States and respondents rely has never been applied to defeat the primary *res judicata* impact of a final judgment. To the contrary, that theory is a discrete rule which in narrow circumstances creates an exception only to collateral estoppel, not to primary *res judicata*. *Commissioner v. Sunnen*, 333 U.S. 591, 597-98 (1948). The rule, as stated in § 70 of the Restatement of Judgments, is as follows:

> "Where a question of law . . . is litigated and determined by a final personal judgment, the determination is not conclusive . . . in a subsequent action on a different cause of action, except where both causes of action arise out of the same subject matter . . ."

By its very terms, such a rule is inapplicable in this case. Section 70 applies only where a prior action resulted in a "personal judgment," whereas *Hewes* was an *in rem* judgment. Section 70 applies only where the subsequent case involves a "different cause of action," whereas respondents' claim here is the same one litigated in *Hewes*. And even where different causes of action are involved, § 70 cannot apply if both arise out of the "same subject matter," which is obviously the situation here.

Turning to *res judicata* in its primary sense, the law is clear that a final judgment like *Hewes* cannot be ignored because of a subsequent change in law. The California Supreme Court emphatically rejected such an idea in *Slater v. Blackwood*, 15 Cal. 3d 791, 796, 126 Cal. Rptr. 225, 543 P.2d 593 (1975):

> " 'In every instance where a rule established by case law is changed by a later case the earlier rule may be said to be "mistaken" . . . . *Such "mistakes" or "injustices"* are *not a ground for equity's intervention.* So to hold would be to emasculate, if not wipe out, the doctrine of res judicata because the doctrine is most frequently applied to block relitigation based upon contentions that a law has been changed. . . .'
>
> ". . . It cannot be denied that judical or legislative action which results in the overturning of established legal principles often leads to seemingly arbitrary and unwarranted distinctions in the treatment accorded similarly situated parties. However, '[p]ublic policy and the interest of litigants alike require that there be an end to litigation.' (*Panos v. Great Western Packing Co., supra,* 21 Cal. 2d 636 at p. 637.) The result urged by plaintiff, to borrow the language of Justice Traynor's dissent in *Greenfield,* would call '. . . into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case.' (*Greenfield v. Mather, supra,* 32 Cal. 2d at p. 36.) The consistent application of the traditional principle that final judgments, even erroneous ones (*Busick v. Workmen's Comp. Appeals Bd., supra,* 7 Cal. 3d 967 at p. 975; Rest., Judgments, § 47, com. b), are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs, regardless of the sympathy their plight might arouse in an individual case." *Id.* at 796-97.

This Court's decision in *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940), shows the same disfavor under federal jurisprudence toward attempts to circumvent final judgments on a theory of "changed law." As the Court stated in *Chicot,* where rights have been finally adjudicated and reduced to a judgment, that "past cannot . . . be erased by a new judical declaration." *Id.* at 374.

VI. CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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March 17, 1980.

APPENDIX: Memorandum of Solicitor General Griswold, April 8, 1971, reprinted from 126 *Cong. Rec.* S. 1632-33 (daily ed. Feb. 20, 1980).

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OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. April 8, 1971.
MEMORANDUM FOR THE FILES

Re United States v. Imperial Irrigation District, et al., No. 67-7-T S.D. California.

I have concluded not to authorize an appeal in this case.

Since this conclusion is contrary to the recommendation of Assistant Attorney General Kashiwa of the Lands Division, and is contrary to the recommendation of three members of my own staff, it is incumbent on me to write this memorandum expressing the reasons for my conclusion. The Solicitor of the Department of the Interior has recommended against appeal, although he gives no reasons for his conclusion.

It is also appropriate to note that various types of pressures have been circulating about including items received in the mail, columns by Jack Anderson, and others. With great care, and to the best of my ability, I have tried to be indifferent to these pressures, and to decide the question (which it is my duty to decide) strictly on the merits. I have tried to approach the problem as a lawyer, and as a Solicitor General, responsible on this matter at this point for the sound administration of justice and of governmental action.

1. Irrigation in the Imperial Valley was originally a private enterprise. On this basis the Valley grew and developed. By the early 1920's, the irrigated area had reached virtually its full extent.

2. The Boulder Canyon Project Act did not make possible the reclamation of any appreciable amount of land in the Imperial Valley. The land had already been reclaimed. The Boulder Canyon Project Act, by providing for the All American Canal, did provide for a more stable water supply for the Valley, by eliminating the risks of taking the water through Mexico; and it provided protection against the considerable risk of flooding with which the Valley had long been threatened. There is no doubt that this was a benefit to the Valley. Except in a very broad sense, though, it did not amount to reclamation. It helped to protect reclamation which had already occurred under private enterprise, but it did not make possible the cultivation of any appreciable number of additional acres.

3. Of great importance is the fact that there were already large land holdings in the Imperial Valley at the time the Boulder Canyon Project Act was adopted. By the late 1920's, the Valley had for many years been probably the most intensively farmed area in the United States. It was, indeed, the source of a large amount of fresh produce marketed all over the country. Much of this was produced on large land holdings. The Imperial Valley had never been a "homesteading" area. It had long been an area where large scale farming was conducted although there were some smaller farms, too.

4. It may well be that Congress could have provided that the improvement resulting from the construction of the All American Canal should be made only on condition that all large holdings be broken up, and that land holdings thereafter be limited to 160 acres. There is certainly nothing in the statute which says this expressly. As I have already indicated, the situation was not akin to the usual reclamation project, which brings new land into cultivation, and can appropriately provide that its benefits should be widely shared among small land holders. Here the Imperial Valley was already well established, and functioning on a very large scale, with many large holdings. It is, it seems to me, a rather different thing to say that large holdings must be broken up than it is to say that large holdings shall not be formed in a new development.

5. I recognize fully that arguments can be made on the basis of the statutory provisions, particularly those referring to "the reclamation laws," that the proper construction of what Congress did is that land holdings in the Imperial Valley should be reduced to 160 acres, in effect, retroactively. Arguments can be made the other way, too. On either basis, the arguments are extremely technical and

complex. Neither conclusion can be said, in my judgment, to be clear or "required" as a matter of ordinary principles of statutory construction.

6. Similarly, the legislative history is far from clear, but can be read to provide support for either view. There are clear statements in the legislative history that the 160 acre limit was not involved. These are included in the opinion of the district court. Similarly, there are explicit statements in the legislative history (referred to in Mr. Kashiwa's memorandum) to the contrary. Actually, though, the entire legislative history is extremely complex. It is very hard to have any conviction that any of these items of legislative history have any close relation to the statute as it was finally enacted. The one thing that can be said about the statute passed by Congress is that it contains no express provision on this question and that the arguments that can be made about it, by reference to other statutes, and so on, are complex, and not very convincing.

7. In this situation, we have what seems to me to be the determinative factor in this case. This is the announcement made by the Secretary of the Interior, Ray Lyman Wilbur in February, 1933. This was to the clear effect that the 160 acre limitation was not applicable in the Imperial Valley, for the reason that no new water was being sold under the All American Canal project.

This was a clear and specific administrative determination, contemporaneously made by the officers charged with the administration of this statute. As far as I can determine, it did not cause a ripple at the time, and it was not seriously questioned in Congress, or elsewhere. Indeed, there was a local court decision confirming it. I do not put much stress on that, but it is a part of the picture which shows that this question was determined in 1933, that it was long regarded as settled, and that many actions were taken in reliance on it.

One of the arguments frequently made by the government is that of the importance of administrative determinations, particularly those contemporaneously made by the officers charged with the administration of the statute in-

volved. This is familiar doctrine in the tax field, and it has long been applied in many other areas of the government. Moreover, there is a further doctrine. Good government requires a substantial measure of stability. There needs to be a basis for reliance on positions taken by responsible administrative officers. Here the position had been outstanding for 34 years before the present suit was filed. Although I make no suggestion that the statute of limitations applies in this case, the usual period of the statute of limitations with respect to real property is 20 years. There is reason behind such provision.

It is said that the action by Secretary Wilbur in February, 1933, was taken in the dying days of the Hoover administration, and therefore, for some reason, is not entitled to great weight. These were, however, the officers who had been responsible for the construction of the Hoover Dam, and who had carried out all of the negotiations under the Boulder Canyon Project Act, and particularly those with respect to the All American Canal. They were the ones who were then charged with the administration of these statutes. It is hard for me to think of officers who would have been better qualified to know what the appropriate resolution of this problem was. Moreover, they could well have felt that it was not fitting to let such a matter go over to the new administration, since they were directly responsible for it, and had the experience to deal with it.

On this matter, it seems to me significant, too, that no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different. But the initial questions were raised about this only in the mid 1940's, and only with reference to another valley served by the project. Application to the Imperial Valley was soon denied, and no action was taken which directly opposed the conclusion of Secretary Wilbur in the Imperial Valley until the opinion of the Solicitor of Interior on December 31, 1964.

This was more than 31 years after Secretary Wilbur's determination. Whether there was any political motivation in this, I do not regard it as relevant. The significant thing, it seems to me, is that the prior determination had then been outstanding for 31 years, had been widely understood and accepted, and had been extensively relied upon.

8. To me, the essence of this case is essentially a question of good administration of the government. Is it sound to have a government system in which official determinations are made, on questions which are at least debatable, are then outstanding for more than 30 years, and are then decided another way by a succeeding governmental official? This does not strike me as good administration, or good government. Of course, life is filled with uncertainties, including commercial life and the ownership of property. But one of the functions of government is to provide for stability and to make it possible for the people to rely on situations which have been determined, and where they make commitments on the basis of that determination.

To me, the controlling factor in this case is the determination of Secretary Wilbur in February, 1933. This was later confirmed by Secretary Krug in 1948. I do not think that it is sound, 38 years later, to be presenting serious questions about that action. Whether it was right or wrong, it was made; and such an administrative determination on a question at least doubtful should be sustained after a lapse of 38 years.

9. I have given careful consideration to the question whether, agreeing that the underlying questions here are arguable, an appeal should not be authorized simply for the purpose of obtaining a decision of an appellate court on an obviously important matter. Indeed, that would be the easy way out; and it has been tempting. I have given consideration to the question whether I am leaning over backwards. However, I have come to the conclusion that it is not appropriate for me, on this matter, simply to say that it is a doubtful question, and so it should be decided by the court of appeals.

The responsibilities of the Solicitor General cannot be described in a few words. If he authorized appeals in every case where the question was doubtful, a great many more government appeals would be taken than in fact are taken. It is very clear that the Solicitor General is an advocate and not a judge. However, he is a very special sort of advocate. He has a responsibility with respect to government litigation, and he is expected to exercise some control over it, so that cases are not presented simply for the purpose of getting a decision. He has some responsibility in some cases to see that cases are not presented which should not be presented, that cases are not presented where the government's position is, on his best analysis, not one which the government should be interested in.

For the reasons I have already given, this seems to me to be such a case. No matter where I look and turn, I cannot get away from the administrative decision which was made, by officers having responsibility in the area, in February 1933, now 38 years ago. I would not say that it is a breach of faith or a breach of trust for the government to seek to change that decision. I have concluded that, in my judgment, it simply is not good government and that it is not a position which, in the particular circumstances of this case, the United States should be advancing before a court.

In summary, it is not just that I think an appeal to the Ninth Circuit Court of Appeals would be unsuccessful, but that I think that it ought to be unsuccessful. In such circumstances, it does not seem to me appropriate to authorize an appeal.

10. It is clear that there are many defects in the opinion of the district court in this case. It misquotes the statute, and makes other errors. I do not think, though, that these are really very significant. In particular, I do not think that they have the significance which is attached to them in the long memorandum from Mr. Kashiwa. It remains the fact that there is nothing really explicit in the statute, and that the statutory provisions require a good deal of rather involved reading together to support the government's

position — a reading together which essentially ignores the special and unusual situation and background of the All American Canal project.

The opinion likewise has some rather sweeping language which might be regarded as having some general effect on the application of the reclamation laws to other projects. It is suggested that there should be an appeal for the purpose of getting this language qualified or disapproved, even if the appeal did not lead to any different result with respect to the Imperial Valley. I am not able to conclude that this is an adequate basis for an appeal. In the first place, these portions of the opinion of the district court are dictum at most, with respect to other projects, and they are rather clearly dictum. I do not think that the precedent will be of any serious moment in subsequent cases involving other areas with different histories and backgrounds. In the second place, I do not think it is appropriate to take an appeal simply for the purpose of getting an opinion limited or corrected, if we think the court reached the right result. Since I think the court here did reach the right result, because of the long continued administrative practice, I do not think that the undue breadth of the opinion is an adequate basis for appeal.

11. In reaching this conclusion, I have sought to consider only the merits of the controversy, and to focus my examination on the responsibilities of this office for the proper handling of government litigation.

For the reasons indicated, however, after full and careful consideration, I have come to the conclusion that there should be no appeal in this case.

ERWIN N. GRISWOLD,
Solicitor General.